

August 1, 2005

Civil Division-Kent County (739-7641)

Mr. David Ledford
Vice President/News & Executive Editor
The News Journal
P.O. Box 15505
New Castle, DE 19720

Re: **Freedom of Information Act Complaint
Against City of Wilmington**

Dear Mr. Ledford:

On February 15, 2005, our Office received your complaint alleging that the City of Wilmington ("the City") violated the public records requirements of the Delaware Freedom of Information Act, 29 Del. C. Chapter 100 ("FOIA"), by not providing you with: (1) "A copy of the Standard operating procedure (SOP) for the police department's 'F Squad'"; and (2) "Copies of all email communications generated since Nov. 1, 2004 regarding shootings, homicides, street violence or illegal drug sales sent to, written by, copied to, or forwarded to any of the following individuals: Mayor James M. Baker, Chief of Staff William Montgomery, Public Safety Director James Mosley, Police Chief Michael Szczerba, Communications Director John Rago, Capt. James Jubb and

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members of the City Law Department.”¹

At the start, we should explain the delay in making a written determination in response to your complaint. Both sides provided us with a significant amount of factual information which required our thorough review. In addition, the issue whether certain information in the possession of the police department is exempt under FOIA was one of first impression for this Office and required original legal research. Our determination could have been more expedient, however, and we apologize to all parties for the delay, which is not in keeping with our usual responsiveness.

By letter dated February 22, 2005, we asked the City to respond to your complaint within ten days. We received the City’s response on March 7, 2005. We asked the City for additional information, which we received on April 7, 2005.

According to the City, the Wilmington Police Department is divided into six squads (A through F). “Squads A through E are regular patrol platoons, with rotating shifts. Each platoon covers the entire city, broken down into geographic **radio** districts. The F squad is the Community Sector Specialist Squad, which has two shifts. The F squad’s only distinction from squads A through E is the F squad is assigned to long-term problem solving, therefore F squad is not generally subject to basic calls for service,”

In reviewing the correspondence and documents provided to us by you and the City, it is apparent that there was some misunderstanding about what information you were seeking regarding the F Squad. By e-mail dated January 7, 2005, you clarified: “Regarding the ‘F-Squad’ document we discussed, we’ve heard it described several ways. What we are looking for is the document used

¹ In your FOIA requests to the City dated December 21, 2004 and January 13, 2005, you requested additional information, but it appears from the record that the City provided that additional information to you and so those issues have been resolved.

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during the police department's mandatory training for members of the F-Squad. The document has been described as an SOP, a policy and a training guide. The document contains standards, goals, requirements and the mission of the squad."

According to the City, there are no standard operating procedures, policies, or training guides specific to the F Squad. "The White Book is the exclusive source of standard operating procedures for the Wilmington Police Department . . . [T]here is no special manual for Community Service Specialists (F Squad) that is unique or specific to F Squad, or otherwise distinct from the White Book, or even distinct from squads A through E."

According to the City, the police department has recently developed written guidelines (not published in the White Book) "prescribing how to conduct a checkpoint encounter. . . . The guidelines are not standard operating procedures of the F Squad, but are general guidelines for the Police Department as a whole." The City provided a copy of the checkpoint guidelines for our *in camera* review.

The City contends that the checkpoint guidelines and the police department's White Book are exempt from disclosure under Section 10002(g)(16)a.5.A of FOIA.

As for the e-mails you requested, the City claims none exist within the parameters of your request. The Assistant City Solicitor has represented that he: (1) "independently verified with Director Mosley, Chief Szczerba and Captain Jubb that none of them sent or received any e-mail regarding shootings, homicides, street violence, or illegal drug sales"; (2) "independently verified with Law Department personnel that no one has sent or received any communications relating to shootings, homicides, street violence, or illegal drug sales during the time period identified by The News Journal"; and (3) "independently verified with [Mayor Baker, Chief of Staff Montgomery, and

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Communications Director Rago] that none of them sent or received any communications relating to shootings, homicides, street violence, or illegal drug sales during the time period identified by The News Journal.”

Relevant Statutes

FOIA provides that “[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body.” 29 *Del. C.* §10003(a).

FOIA exempts from disclosure “[t]hose portions of records assembled, prepared or maintained to prevent, mitigate or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety.” *Id.* §10002(g)(16)a.5.

Legal Authority

A. Law Enforcement Manuals

The City provided for our *in camera* review a copy of the index to the Wilmington Police Department’s “Police Officer’s Manual” (a/k/a the White Book). The index shows that the White Book is a comprehensive compendium (“A” (Abandoned Car) through “Z” (Zoo)) of operating procedures for all police matters, criminal as well as personnel. The City also provided us for *in camera* review a copy of the police department’s check point guidelines.

The City claims that the White Book and the check point guidelines are exempt from disclosure under FOIA under Section 10002(g)(16). The General Assembly enacted that exemption in 2002 in response to the terrorist attacks of 9/11.

Section 10002(g)(16) exempts from public disclosure any records that “could jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual.” The exemption goes on to identify specific types of records, including “vulnerability assessments, specific tactics, specific emergency procedures, or specific security procedures”; and “[b]uilding plans, blueprints, schematic drawings, diagrams, operational manuals, or other records of mass transit facilities, bridges, tunnels, . . .”

Subparagraph 5. of the statute more broadly exempts “records assembled, prepared, or maintained to prevent, mitigate, or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety” including “vulnerability assessments or specific and unique response or deployment plans.”

The federal FOIA has a similar exemption for records that would disclose “investigative techniques and procedures” or “endanger the life and physical safety of law enforcement personnel.” 5 U.S.C. §552(b)(7)(E)(F).

In *Caplan v. Bureau of Alcohol, Tobacco & Firearms*, 587 F.2d 544 (2nd Cir. 1978), an attorney made a FOIA request for the BATF pamphlet “Raids and Seizures.” The federal district court held that portions of the pamphlet regarding law enforcement techniques and procedures were exempt from disclosure “including descriptions of the equipment used by agents in making raids, the methods of gaining entry to buildings used by law breakers, factors relating to the timing of raids, and the techniques used by suspects to conceal contraband.” 587 F.2d at 545. “[R]elease of such parts of the pamphlet would hinder investigations, enable violators to avoid detection and jeopardize the safety of Government agents.” *Id.*

It would be anomalous indeed to attribute to Congress the intention to require agency revelation of internal law enforcement manuals. Such a step would increase the risk of physical harm to those engaged in law enforcement and significantly assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection.

587 F.2d at 547. Accord *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 656 (9th Cir. 1980) (the exemption for investigatory techniques and procedures “would be pointless unless the manuals instructing agents to use those techniques and procedures were also exempt from disclosure”).

Although a response to 9/11, Section 10002(g)(16) of Delaware’s FOIA is not limited to information that might aid terrorists to destroy buildings or infrastructure, but also exempts information “prepared or maintained to prevent, mitigate, or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety.” 29 *Del. C.* §10002(g)(16)A.5. We believe that exemption covers law enforcement manuals to the extent they contain information that would disclose investigative techniques and procedures, or endanger the life and safety of citizens or law enforcement officers.

We appreciate the difficulty a requestor may have in trying to frame a FOIA request when it is not certain what records are in the possession of the government entity. Your FOIA request specifically mentions “A copy of the standard operating procedures (SOP) for the police department’s “F” Squad.” Based on the representations of the Assistant City Solicitor, there apparently are no written operating procedures, policies, or training guides specific to the F Squad. “[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record.”

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Att'y Gen. Op. 96-IB28 (Aug. 8, 1996).

Our investigation, however, reveals that there may be two other records which may contain information you are seeking, and to which you might have sought access: (1) the police department's checkpoint guidelines; and (2) the White Book.

We have reviewed the City's checkpoint guidelines *in camera*, and believe that they fall within the exemption under FOIA. Public disclosure of those guidelines might hinder criminal investigations, enable violators to avoid detection, jeopardize the safety of police officers, and undermine enforcement of the law." *Caplin*, 587 F.2d at 545.

We now address the White Book. In *Caplin*, the federal appeals court held that only those portions of the BATF pamphlet "Raids and Seizures) which might disclose confidential law enforcement techniques and procedures were exempt from disclosure. Other portions pertaining to purely "administrative matters" must be disclosed to the public. "All administrative materials, even if included in staff manuals that otherwise concern law enforcement, must be disclosed unless they come under one of the other exemptions of the act." *Hardy*, 631 F.2d at 657.

The Index to the "White Book" indicates that there are portions of the manual which appear to be protected by Section 10002(g)(16) of FOIA (*e.g.*, Building Security, D.U.I. Investigation, Court Security, Felony car stops, Stakeout, V.I.P. Protection). Other portions of the manual appear to be administrative in nature and may not be exempt under FOIA (*e.g.*, Budgeting, Career Ladder Program, Classification of Uniforms, Meal Periods, Overtime, Promotion System).

We do not believe that the index to the White Book is exempt from disclosure under FOIA because the listings do not reveal any confidential law enforcement techniques or otherwise

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jeopardize officer safety and effective law enforcement. To the extent that the Index is within the purview of your FOIA requests, the City must make a copy available to you. That will enable you to determine whether any portions of the White Book are what you are seeking in your FOIA requests.²

If so, you may request a specific portion or portions of the White Book, at which time the City can (consistent with this opinion) decide whether the section is protected from disclosure under FOIA as a confidential law enforcement manual.

² “Unquestionably, public records must be described clearly enough to permit the agency to determine whether writings of the type described in the request are under its control.” *California First Amendment Coalition v. Superior Court*, 67 Cal.App.4th 159, 165 (1998). “However, the requirement of clarity must be tempered by the reality that a requestor, having no access to agency files, may be unable to precisely identify the documents sought. Thus, writings may be described by content.” *Id.* 165-66.

B. E-Mails

“FOIA does not require a public body to produce public records that do not exist.” *Att’y Gen. Op.* 96-IB28 (Aug. 8, 1996). The Assistant City Solicitor has represented, after verifying with the individuals named in your FOIA request, that they do not have any e-mails responsive to your request.³ It has been our historical practice to accept such representations from an attorney for “the custodian of public records to determine that such documents do not exist for purposes of FOIA.” *Att’y Gen. Op.* 97-IB01 (Jan. 14, 1997). Based on the representations of the Assistant City Attorney, we cannot compel disclosure under FOIA what apparently does not exist. “[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record.” *Att’y Gen. Op.* 96-IB28.

³ The City also claims that the e-mails would be exempt from disclosure under Section 10002(g)(3) (investigative file) and/or Section 10003(g)(6) (attorney-client privilege/work product). Lacking any information that the City has any responsive documents in its custody, we do not have to determine the applicability of either of those two exemptions.

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Conclusion

For the foregoing reasons, we determine that the City did not violate the public records requirements of FOIA by not providing you with access to the police department's checkpoint guidelines because those guidelines are exempt from disclosure under FOIA as confidential law enforcement techniques and procedures.

We also determine that the City did not violate the public records requirements of FOIA by not providing you with access to any standard operating procedures or training manuals specific to the "F" squad, and e-mails you requested, because those documents apparently do not exist, based on the representations of the Assistant City Solicitor.

To the extent you are seeking access to the police department's White Book, we determine that the index to the White Book is a public record under FOIA. We do not have to determine at this time whether any particular section of the White Book is exempt under FOIA because that issue is not yet ripe for decision.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Malcolm S. Cobin
State Solicitor

cc: The Honorable M. Jane Brady

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